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No. 2007-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

LORENA MINIX, BRENDA SIMS, and LINDA SIMS,

PETITIONERS,

v.

JELD-WEN, INC.,

RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May an employer avoid liability in a Title VII sexual harassment case, when the employee presents evidence that the employer had actual notice of unlawful sexual harassment, based on a report of said conduct to a manager at the facility in question. To the extent the employer's anti-harassment policy is relevant to determine notice of unlawful sexual harassment, should said policy be dispositive or considered as part of the totality of the circumstances.

II. Does the mere presence of an anti-harassment policy negate holding an employer liable, for a claim of sexual harassment under Title VII, based on constructive notice.

LIST OF PARTIES

The parties listed in the caption contain all parties to the proceeding in the court whose judgment is sought to be reviewed.

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The opinion of the United States Court of Appeals for the Eleventh Circuit, not selected for publication, is found at Minix et. al. v. Jeld-Wen, Inc., 2007 WL 1828259 (11th Cir. 2007). The summary judgment order of the United States District Court, Middle District of Alabama, is reported at Minix et. al. v. Jeld-Wen, Inc., 2006 WL 2971654 M.D. AL (2006).

JURISDICTION

Judgment was entered by the United States Court of Appeals for the Eleventh Circuit on June 27, 2007. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)(1)

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, **sex**, or national origin.

STATEMENT OF THE CASE

Facts material to consideration of the questions presented

Petitioners Lorena Minix, Brenda Sims, and Linda Sims are all former female employees of Respondent Jeld-Wen, Inc. (hereinafter "respondent"). Respondent is a company headquartered in Klamath Falls, Oregon, which manufactures building products, including windows and doors. It acquired a mill-works plant in Roanoke, Alabama, in 2002; said plant being the workplace of petitioners. All three petitioners were subjected to unlawful workplace harassment by their supervisor, Richard Fetner.

Additionally, three other women, Kathy Thornton, Lisa Cook, and Mary Lou Laws were also subjected to harassment by Fetner, simultaneous to the harassment perpetrated against petitioners. The harassment that each endured is relevant to the basis of this petition and will be briefly summarized.[1]

Petitioner Lorena Minix was hired by Fetner to work for Millworks Specialty, Inc. in September of 2001. Respondent eventually took over operation of this facility in late 2001 or early 2002 and retained Fetner and Ms. Minix as employees. Fetner was Ms. Minix's supervisor.

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[1] The opinion of the District Court details the unlawful harassing behavior of Fetner. See Appendix B.

In 2003, Ms. Minix was sexually harassed by a co-employee, Ronald Bowen, who masturbated in front of her on the job.[2] Ms. Minix complained to her supervisor, Fetner, and he took no action, although required to do so by the company's anti-harassment policy.[3] Only when another employee reported the conduct to Pat Galvez, the general manager of the facility, did an investigation take place.

Ms. Minix was displeased with the investigation as she was made to work with Bowen for an additional two weeks after the incident, even though the incident was corroborated by another employee, Towanna Zachery, who actually witnessed the harassment. Bowen ultimately resigned while the investigation was pending, although he announced that harassment at the facility was prevalent, before leaving.[4]

During 2001 and early 2002, Ms. Minix and Fetner were involved in an intimate relationship. In 2004, although the consensual relationship was over, Fetner began to sexually harass Ms. Minix. Ms. Minix testified that Fetner put his arms on her breasts, hugged her without permission and "spanked" her. Additionally, Fetner would speak inappropriately to Ms. Minix and suggested that

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[2] This incident does not form the basis of any of Ms. Minix's claims in this matter.

[3] The respondent's anti-harassment policy is part of the Eleventh Circuit's opinion and is found in Appendix A.

[4] That allegation was never investigated.

they, "go have about four hours of sex." Ms. Minix indicated that this conduct happened on a constant, almost daily, basis.

Fetner also offered to "fix" Ms. Minix's time card if she would go to his house to "drink beer and have sex." Furthermore, Fetner once told Ms. Minix, "I'd like to eat you from the top of your head to your toes." Again, Ms. Minix indicated this conduct was an everyday or every other day occurrence for months.

Petitioner Brenda Sims became an employee of respondent on or about June 1, 2004. Ms. Brenda Sims was also interviewed, hired, and supervised by Fetner. Shortly after Ms. Brenda Sims was hired, Fetner, on two occasions, rubbed Ms. Sims' legs, once close to her knee and another time on her upper thigh. Both instances occurred in Fetner's office. Fetner also twice touched Ms. Brenda Sims' breast. On one occasion, Fetner came up beside Ms. Brenda Sims and touched her breast while putting his arm around her. On another occasion, he grabbed her breast, after calling her into the break room.

In addition to the physical harassment, Fetner propositioned Ms. Brenda Sims repeatedly. From June 2004 through August 2004, Fetner told Ms. Brenda Sims that, should she come to his house, she wouldn't have to worry about missing work time.

Petitioner Linda Sims (no relation to Brenda) became an employee of respondent on or about June 8, 2004. From the beginning of her employment,

Petitioner Linda Sims was subjected to unwelcome harassment by Fetner, her supervisor, who was responsible for all day to day operations of the plant at this time.[5]

Fetner harassed Ms. Linda Sims by making sexual comments about her body, requests for dates, and touching her body without permission. Specifically, Fetner told Ms. Linda Sims that her "butt" looked like two basketballs, and he wanted to go dribbling. Fetner would also mimic dribbling a basketball when he walked by Ms. Linda Sims.

On One occasion, again in the break room, Fetner came behind Ms. Linda Sims and indicated one of her "basketballs" looked deflated, "and he had a needle that he could pump me up." Fetner also told Ms. Linda Sims that he would play with her "basketballs" if they were alone. Additionally, Fetner, the first week Ms. Linda Sims began working at the facility, began to ask her out on dates and invited her to his house to decorate his bedroom.

Kathy Thornton worked at the Roanoke, Alabama, facility beginning in 1997 and became an employee of the respondent when they took over operations in 2002. Ms. Thornton was not a plaintiff in this action because she was persuaded to sign a severance and release agreement, when the plant closed in 2004.

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[5] Mr. Pat Galvez, general manager of the facility, had transferred to another location within the company, leaving Fetner in charge of the day-to-day operations of the Roanoke facility.

Ms. Thornton, like the petitioners, was harassed by Fetner constantly. Fetner improperly touched her, grabbed her, "grabbed himself" in front of her, and requested oral sex from her on the job. According to Ms. Thornton, if she was wearing a shirt which showed her "nipples," Fetner would ask, "if they needed massaging," or if he could "suck on them." Fetner repeatedly propositioned Ms. Thornton to come to his house for sexual favors.

Fetner also rubbed Ms. Thornton's breast, and grabbed her buttocks. Furthermore, he would come behind Ms. Thornton in order to stick broom handles in her shorts. [6] Ms. Thornton, in an effort to halt the harassment, had sexual intercourse with Fetner on one occasion. Thornton described her desperation, in succumbing to Fetner's requests, by saying she felt like a "gun was to her head."

Most significant to the petitioners' claims is the fact that Ms. Thornton reported Fetner's conduct to Joe Mendoza, coordinating group manager at the Roanoke plant, while it was happening.[7] The report by Ms. Thornton to Mendoza pre-dated the harassment of the petitioners. After Ms. Thornton reported the conduct, Mendoza repeatedly asked about the conduct, but never took any action to remedy the harassment, as required by respondent's

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[6] This happened two or three times.

[7] It is not disputed that an employee can establish employer liability under Title VII if it has actual notice of harassment, even if the harassment giving rise to the notice is of an employee other than the plaintiff. The Eleventh Circuit says as much in its opinion. See Appendix A. See Also, Dees v. Johnson Controls Servs., Inc, 168 F.3d 471 (11th Cir. 1999).

anti-harassment policy. Thornton testified that she believed Mendoza would help her.

Mendoza entered management with respondent in 1990. He testified that the company had an anti-harassment policy at that time, that he was familiar with it, and that, as a manager, he was required to implement it. When asked about his responsibilities under respondent's anti-harassment policy, as a coordinating group manager, Mendoza testified as follows:

> "Well first of all you should make your employees aware of that, even though it's in the handbook, because the majority of people don't read it, the majority of employees don't read it, just to make them aware of the fact that harassment, how our stance is on harassment, and that they're able to, you know, they should come to **us** if they want to complain or come to the immediate supervisor."

Mendoza's testimony is that he is a proper person to receive complaints of sexual harassment under the respondent's anti-harassment policy. In addition to Mendoza's testimony, Robert Sturm, legal counsel for respondent, when asked directly about the responsibilities of managers under the policy, indicated:

> "Managers have greater responsibility with respect to the policy than non-managers. And that includes implementing the policy...they

have greater involvement when the policy is triggered, for example, by somebody raising a complaint."

Viewing the evidence in its most favorable light towards petitioners, both Mendoza and Sturm admit that Mendoza, as a manager, is a proper person to register sexual harassment complaints to, and he has a responsibility to implement the policy by, in this instance, acting on Ms. Thornton's complaints and taking remedial action.

In addition to the petitioners and Ms. Thornton, Fetner sexually harassed other female employees as well. Lisa Cook, one of said employees, was improperly touched, by Fetner, between her legs in her "private" area. Ms. Cook also indicated that Fetner would improperly touch her breast. Cook indicated that the harassment was, "an everyday thing."

Fetner also attempted to forcibly kiss Ms. Cook, offered her a vinegar bath on her lunch break, and made "vulgar" comments about how good she looked. Cook indicated that Fetner repeatedly told "dirty jokes" in the workplace, that the jokes were about sex, and that he referred to women's private "parts" as "pussy cats." Furthermore, Cook testified that pranks, of a sexual nature, were common in the plant.

This testimony was buttressed by Ms. Zachery, the employee who witnessed the incident regarding Ms. Minix and Ronald Bowen. Ms. Zachery indicated

that persons talking about their "sex lives" was prevalent at the facility and that women's underwear was once placed on a stick beside the front door where women entered.

Long after Ms. Thornton's report of Fetner's harassment to Mendoza, Brenda Sims contacted Dan Hees, a manager based in Sparta, TN, who came to the Roanoke facility in October of 2004. Hees met with petitioners, Kathy Thornton, and Lisa Cook about the allegations against Fetner. After meeting with the female employees, Hees met with Fetner, and Fetner resigned, although Hees did not ask for his resignation.[8] Hees also testified that he did not believe the reports of harassment.

Petitioners filed suit against respondent in the United States District Court, Middle District of Alabama, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 1981a, 2000e-2(a)(1), alleging sexual harassment violations by the respondent. Jurisdiction was proper in the district court pursuant to 42 U.S.C. § 2000e-5(f), as a case arising under said statute of the United States. The district court granted respondent's motion for summary judgment, based on the argument that petitioners could not demonstrate liability for Fetner's illegal harassment, and the Eleventh Circuit affirmed. Following the opinions below, petitioners

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[8] Fetner was awarded severance by respondent, in violation of its own severance program, as such is not available to any employee who quits.

file this writ of certiorari, requesting review of said opinions.[9]

Reasons for the allowance of the writ

Review by this Honorable Court is necessary to settle the conflict between the United States Circuit Courts of Appeal as to when an employer can be charged with notice of unlawful sexual harassment, also known as direct liability, under Title VII. The Eleventh Circuit, in this and other cases, as well as a recent decision by the Eighth Circuit, have held that an employer's anti-harassment policy, alone, will determine whether an employer has notice, or direct liability, of unlawful sexual harassment occurring at its facility, reasoning that only a report of harassment consistent with the policy will put the employer on notice.

Other circuits, including the Fourth, Six, Seventh, and Tenth, have held that the determination, regarding notice to the employer, for establishing Title VII liability, be made by viewing the totality of the circumstances. Reports of unlawful sexual harassment, these circuits reason, will be viewed on a case by case basis, viewing all the circumstances surrounding the report of harassment, to determine if the employer had notice of the harassment, such that liability may be imposed, using agency principles. Theses circuits have permitted employer

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[9] Although petitioner Linda Sims strenuously disagrees with the Eleventh Circuit's opinion regarding her tangible employment claim, there is not a basis for certiorari review. As such, the only issue before this Court are petitioners' hostile work environment claims.

liability when the anti-harassment policy was not literally followed by the employee in reporting the alleged harassment, when other factors suggest that the employer had actual notice of the alleged harassment.

In Meritor v. Savings Bank FSB v. Vinson, 477 U.S. 57 (1986), this Court recognized Title VII hostile work environment sexual harassment. This Court also held, in Meritor, that courts should look to agency principles to determine whether or not employer liability exists. Meritor at 73. In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), this Court, while maintaining liability against an employer who either knew or should have known about unlawful sexual harassment and failed to halt it, extended vicarious liability to the employer, in supervisor hostile work environment cases, subject to what is now known as the Faragher/Ellerth affirmative defense. Ellerth at 759, 765. Since Ellerth and Faragher, the circuit courts of appeal have grappled with how to evaluate employer liability, in hostile work environment cases, when there is an anti-harassment policy in place, yet the plaintiff is relying on direct liability, claiming the employer knew or should have known of the harassment and failed to stop it.

In the case sub judice, the Eleventh Circuit, consistent with circuit precedent, [10] has held that the

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[10] See Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1364 (11th Cir. 1999).

policy, alone, will determine if the employer has notice of the harassment. The Court held that Mendoza, notwithstanding his own testimony, was not a person the policy identified to receive harassment complaints from employees, thus; respondent was never on notice of Fetner's unlawful harassment. The reasoning in this case was followed by the Eighth Circuit in Weger v. City of Ladue, ___F.3d___, 2007 WL 2669425 (8th Cir. 2007), and this case was cited prominently by the Eighth Circuit. Weger at 8.

In Curran v. AMI Fireplace Company, Inc., 163 Fed. Appx. 714 (10th Cir. 2006), the Tenth Circuit held that, where the plaintiff reported supervisor harassment to persons not identified in the company's anti-harassment policy to receive said reports, the district court erred in granting summary judgment. Curran at 721, 722. Curran reported the harassment to the office and general managers, neither of which were identified by the policy to receive reports of harassment. Id. The Tenth Circuit reasoned, as petitioners argue here, that "a reasonable jury could find that AMI, through its managers...did not take prompt and adequate steps to remedy Payson's behavior." Id. Therefore, under the totality of circumstances, the notice issue was a jury question. Id.

In Howard v. Winter, 446 F.3d 559 (4th Cir. 2006) the Fourth Circuit also overturned a summary judgment against an employee, based on the fact that the employee had registered complaints about unlawful harassment, which placed the employer on

notice. The employer's failure to timely act on the complaint established a jury question as to the employer's liability. Howard at 569, 570.

In Howard, the employer argued, as does respondent in this case, that the employee should be precluded from recovery, because she did not report the harassment to the person designated to receive harassment complaints by the anti-harassment policy. Id. The Fourth Circuit found potential employer liability, based on a harassment report to someone not designated to receive them, despite the perpetrator being treated as a co-worker or the plaintiff, rather than a supervisor, where employer liability is scrutinized more closely.

The Sixth Circuit has held similarly to the Fourth and Tenth Circuits, regarding notice to establish employer liability, in Randolph v. Ohio Department of Youth Services, 453 F.3d 724 (6th Cir. 2006) and Jackson v. Quanex Corporation, 191 F.3d 647 (6th Cir. 1999) (notice on a claim of racial discrimination). Additionally, the Seventh Court, in Erickson v. Wisconsin Department of Corrections, 469 F.3d 600 (7th Cir. 2006), held that establishing employer liability, under Title VII, based on negligence, is fact specific and, "must be analyzed according to the totality of the circumstances." Erickson at 606.

Only this Court can settle the conflict between the circuits regarding what constitutes notice of the employer, to establish direct employer liability, for hostile work environment sexual harassment cases. If this Court does not grant the writ, then victims of

workplace sexual harassment will be treated differently, depending on their domicile; some will be able to recover if the employer has notice, while others will not.

Another reason to allow the writ is that the Eleventh Circuit's opinion has eliminated constructive notice, as a basis for holding on employer liable for supervisor sexual harassment, in a hostile work environment case, by the mere existence of an anti-harassment policy. The Eleventh Circuit specifically held that the presence of the written policy, "forecloses resort to constructive notice as a means of establishing the notice required for direct liability."

Constructive notice, or evidence that an employer "should have known" of the harassment and failed to correct it, has been a valid mechanism to establish employer liability, under Title VII for decades. The ruling, by the Eleventh Circuit, that the mere presence of a written anti-harassment policy negates the use of constructive notice as a means to establish employer liability, in a supervisor sexual harassment case, is an important federal question that should only be settled by this Court. Additionally, the Eleventh Circuit's opinion, on this issue, conflicts with the relevant decisions of this Court, namely Meritor, Ellerth, and Faragher, which all embrace constructive notice as a means to establish employer liability under Title VII, particularly in supervisor harassment cases.

Argument

I. Review is warranted to resolve the conflict, between the circuits, regarding when an employer can be held liable, for supervisor sexual harassment, on the basis that the employer had notice of the harassment and failed to take remedial action.

This Court's opinion in Ellerth reaffirms the Meritor reasoning that employer liability for Title VII sexual harassment cases should be based on agency principles. Ellerth at 755. This Court relied on §219(2) of the Restatement (second) of Agency, as a starting point, to determine when employers could be held liable for sexual harassment, even though the actions are likely outside the scope of the employee's employment. Id at 758.

This Court reaffirmed the principle that an employer can be held liable where its own negligence is a cause of the harassment. Id at 759. "An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." Id. This Court went on to say that negligence sets a "minimum" standard for employer liability. Id.

The Ellerth decision went on to expand liability to employers for non-tangible employment sexual harassment in cases of supervisor harassment, as is the case here. Id at 765. This Court held, as it did in Faragher, that the employer would be subject to

vicarious liability, a much higher standard of liability than negligence, in these types of cases, subject to an affirmative defense, if the employer could demonstrate that; (1) it exercised reasonable care to prevent the harassment and correct, promptly, any sexual harassing behavior and (2) that the employee failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm.

This affirmative defense goes to the issue of vicarious liability, however, and has no bearing on a case where the employer's own negligence, or direct liability, is at issue. In the case sub judice, Kathy Thornton's report of harassment to Mendoza, a manager at the facility in question, placed the respondent on notice of Fetner's actions.

Both Mendoza and Sturm admitted that Mendoza had responsibilities, under the policy, which he failed to fulfill. Had Mendoza fulfilled those responsibilities, he would have prevented the harassment of petitioners. As such, the petitioners have demonstrated negligence by respondent sufficient to establish direct liability for Fetner's subsequent harassment of petitioners.

The Eleventh Circuit, in accepting respondent's argument, held that petitioners could not rely on Thornton's report to Mendoza, to establish notice to respondent, because he was not a member of management designated to receive harassment complaints, under respondent's anti-harassment

policy. [11] The Eleventh Circuit ignored the evidence that Mendoza, himself, testified that he could receive harassment complaints under the policy, as well as Sturm's testimony regarding Mendoza's responsibilities, as a manager, to implement the policy when a complaint is made. (Appendix A).

The Eleventh Circuit held that, when an anti-harassment policy is in place, the policy, and only the policy, establishes when the employer receives notice, notwithstanding any other evidence of notice to the employer. Id. This same reasoning was adopted by the Eighth Circuit in Weger v. City of Ladue, __F.3d__, 2007 WL 2669425 (8th Cir. 2007), which cited this case extensively. In Weger, the employee presented evidence that a supervisor observed harassment of the plaintiff for over two years, and said supervisor failed to report same as required by the city's anti-harassment policy. Weger at 5, 8. The Eighth Circuit, relying explicitly on this case, nevertheless held that the employer could not be held liable for actual or constructive notice, because the employee failed to report the harassment as delineated in said policy.

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[11] Petitioners do not concede that the policy, itself, excluded Mendoza as an appropriate person to report complaints to. Among the list of company officials an offended employee is to report harassment to is, inter alia, "your corporate manager." Although that position is not defined in the policy, as a manager at the facility Ms. Thornton worked, Mendoza is arguably under that category. At a minimum, any ambiguous term is to be construed against the respondent as the drafter of the policy.

These circuits have taken the Faragher/Ellerth defense far beyond its intended scope. Instead of using the defense as a shield, when an employer makes a good faith effort to prevent unlawful sexual harassment, these decisions allow an employer to use the defense as a sword to absolve itself of liability, even when its management either knew, or should have known, that unlawful harassment was taking place against an employee.

As stated earlier, other circuits have maintained the proper balance, when evaluating employer direct liability involving hostile work environment cases, where the employee asserts liability based on the employer's negligent failure to address unlawful harassment, after receiving notice of it. In the Curran case, cited earlier, the Tenth Circuit found summary judgment improper, where the employee reported supervisor harassment to the employee's office manager and general manager. Curran at 716.

Rejecting the employer's argument that this did not establish actual notice of the harassment because the policy required the employee to report the harassment to the human resources manager, the Tenth Circuit held that a reasonable jury could find the employer liable, based on actual notice, due to the reports to the mangers. Id at 715, 721. Ironically, this employee received the same assurance that Kathy Thornton received when she reported Fetner's harassment to Mendoza; the managers told her they, "would take care of it." Id at 722.

In the case of Howard v. Winter, 446 F.3d 559 (4th Cir. 2006), the employee was employed by the Naval Air Systems Command in Arlington, Virginia. Howard at 562. Another employee, Randy McCall sexually harassed Howard for over a year. Id. Although the company's policy required employees to report any harassment to their superior officer, Howard, instead, reported the harassment to a member of the human resources division. Id at 562, 563. Again, the Fourth Circuit rejected the argument that liability based on actual notice was foreclosed by the fact that the employee had not reported the harassment consistent with the policy. Id at 569.

The Fourth Circuit took into account that the manager, who received the report of harassment, claimed to be a manager that could hear these types of complaints. Id. In this case, Mendoza, as well as Sturm, both admitted that Mendoza had responsibilities after receiving Ms. Thornton's complaints to implement the anti-harassment policy, which he failed to do. This action is enough to establish actual notice by respondent of Fetner's harassment. As such, a reasonable jury could find liability based on said notice and the failure to take remedial steps subsequent to the notice.

In Erickson v. Wisconsin Department of Corrections, 469 F.3d 600 (7th Cir. 2006), the Seventh Circuit held the employer liable for negligence, under Title VII, when the employee, a payroll and benefits specialist, was raped by an inmate. Erickson at 601. The Seventh Circuit found liability, based on

negligence, based on the totality of the circumstances. Id at 606. Part of the reason the liability issue was permitted to be decided by a jury hinged on the fact that the employee had relayed an earlier threat to her supervisors, and they failed to take remedial action. Id at 607. The court reasoned that the earlier report put the employer on notice so as to establish liability for the later attack. Id.

Finally, the Seventh Circuit ruled that the failure of the plaintiff-employee to report harassment, consistent with the anti-harassment policy, did not bar a finding of employer liability based on actual or constructive notice. Randolph v. Ohio Department of Youth Services, 453 F.3d 724, 735 (6th Cir. 2006). Randolph involved the sexual assault of an employee of a youth detention facility. Id at 728. The employee reported daily threats to her superiors, but she did not report the threats consistent with the anti-harassment policy in place. Id at 734, 735. The Seventh Circuit ruled that the reports to the supervisors, coupled with the inadequate response of the employer, was sufficient to establish notice, notwithstanding the failure of the employee to report the harassment consistent with the policy. Id.

The Seventh Circuit used a totality of the circumstances approach, rather than the rigid holding of the Eleventh Circuit, in this matter, which ends the inquiry of employer direct liability, at the anti-harassment policy. Had the Eleventh Circuit used a totality of the circumstances approach in this case, it clearly would have allowed a reasonable jury to make the liability determination. The totality of

circumstances approach is also more consistent with this Court's decisions in Meritor, Ellerth, and Faragher, which all embrace the concept of employer liability where the employer has notice of the harassment, yet fails to stop it.

All of these cases endorse the proposition that an employer may be held liable when, as in the case sub judice, it had actual or constructive notice of the harassment and failed to take remedial action. The Eleventh Circuit's approach would allow an employer to avoid responsibility, when it has notice, based on its own policy, drafted as much to avoid liability than to prevent harm to its employees.

Unquestionably, the rights of employees to be free from unlawful sexual harassment is an important federal issue. It is also important that employees, treated illegally, not be subjected to differing results, if they can prove actual notice of the harassment by the employer, based on what part of the country they reside. This Court should grant the writ to resolve this important conflict between the circuits regarding direct liability for employer liability under Title VII.

II. Review is warranted to decide the important federal issue of whether the presence of an anti-harassment policy will preclude an employee from establishing employer liability based on constructive notice.

This Court, in Meritor, Ellerth, and Faragher all embrace the concept of constructive notice, to

establish employer liability in hostile work environment cases. Proof that an employer "should have known" of the unlawful harassment, coupled with a failure to act, is within the constructive notice framework, such that it demonstrates negligence by the employer to establish liability. Ellerth at 759.

The Eleventh Circuit embraced this concept in Allen v. Tyson Foods, Inc. 121 F.3d 642 (11th Cir. 1997), wherein the court held that, where an atmosphere of inappropriate sexual misconduct permeates the workplace, constructive notice will be imputed to the employer to establish liability under Title VII. The simultaneous harassment of six different women in this case coupled with the other inappropriate sexual conduct outlined above would quite clearly establish constructive notice under the Allen standard. In fact, neither the Eleventh Circuit nor the district court questioned that such was the case. Instead the Eleventh Circuit held, explicitly, that the existence of an anti-harassment policy forecloses use of constructive notice as a means to establish employer liability. See Appendix A.

In essence, the Eleventh Circuit used the Faragher/Ellerth affirmative defense to vicarious liability to eliminate a form of direct liability. This is a remarkable extension of the affirmative defense. It allows an employer to avoid direct liability, by merely having an anti-harassment policy, no matter how blatant the harassment, and even if the harassment, as here, is both widespread and being perpetrated and tolerated by mangers and supervisors.

This decision to eliminate constructive notice, by the presence of an anti-harassment policy, is in conflict with the prior decisions of this Court that hold constructive notice is a basis to establish direct employer liability in hostile work environment supervisor cases. This decision tilts the balance of Title VII, unfairly in favor of the employer,[12] as it allows an employer to ignore obvious illegal harassment, as long as it has a policy to present in court. Furthermore, it provides no incentive to the employer to uncover and halt harassment it may have notice of, because the employer can feel secure that it will not be held accountable as long as a policy is in place.

If Faragher/Ellerth is to be expanded to eliminate constructive notice, when an anti-harassment policy exists, then it should only be done by this Court. Liability for sexual harassment is an important issue, and limiting said employer liability should be decided by this Court. As the Eleventh Circuit's opinion decides this important issue, in contravention of the prior decisions of this Court, the writ should be granted and the opinion below should be reversed.

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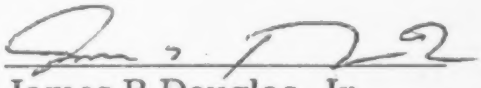
[12] This case is somewhat analogous to Hope v. Pelzer, 536 U.S. 730 (2002), in this regard. In Hope, this Court ruled that the Eleventh Circuit's holding, regarding qualified immunity was reversed, as its expansion of qualified immunity tilted the balance in favor of state actors too far.

CONCLUSION

Based on the forgoing, petitioners respectfully request that this Honorable Court grant the writ of certiorari and reverse the Judgment of the Eleventh Circuit.

Respectfully submitted this 21st day of November, 2007.



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APPENDICES

United States Court of Appeals
For the Eleventh Circuit

No. 06-16094

District Court Docket No.
05-00685-CV-T-E

LORENA MINIX,
BRENDA SIMS,
LINDA SIMS,

Plaintiffs-Appellants,

Versus

JELD-WEN, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: June 27, 2007
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-16094
Non-Argument Calendar

D. C. Docket No. 05-00685-CV-T-E

LORENA MINIX,
BRENDA SIMS,
LINDA SIMS,

Plaintiffs-Appellants,

Versus

JELD-WEN, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Alabama

(June 27, 20007)

Before TJOFLAT, ANDERSON, and HULL, Circuit Judges.

PER CURIAM:

Lorena Minix, Linda Sims, and Brenda Sims sued their former employer, Jeld-Wen, Inc., alleging claims for hostile-work-environment sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). They alleged that their immediate supervisor, Richard Fetner, made repeated and unwelcome sexual remarks to them and touched them inappropriately at various times throughout their employment.[1] Fetner's last harassing act occurred on August 1, 2004. Yet they did not report Fetner's behavior to officials at Jeld-Wen, Inc., until October 13, 2004. Upon investigation, Fetner promptly resigned, and the plant where Minix and the Simses worked was shut down shortly thereafter.

Following discovery, the district court granted summary judgment to Jeld-Wen, Inc., holding the company not vicariously liable for Fetner's harassment. The district court concluded that none of the plaintiffs suffered a tangible employment action and that Jeld-Wen, Inc., successfully established both elements of the vicarious-liability affirmative defense spelled out in Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742,

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[1] Minix's EEOC charge says that she was harassed by Fetner as early as September 1, 2001, but that Fetner's harassment ended by July 1, 2004. Linda Sims's EEOC charge says that she was harassed by Fetner between April 1, 2004, and August 1, 2004. Brenda Sims's EEOC charge says that she was harassed by Fetner between June 1, 2004, and August 1, 2004.

118 S. Ct. 2257 (1998).[2] Minix and the Simses appeal.

On appeal, Minix and the Simses collectively argue:

First, that the Faragher/Ellerth affirmative defense to vicarious liability is inapplicable because Jeld-Wen, Inc., is directly liable for Fetner's harassment; its direct liability stemming from either

> (a) the fact that the company had actual notice about Fetner's harassment of their co-worker, Kathy Thornton, yet failed to take remedial action, or
> (b) the fact that the company had constructive notice of Fetner's harassing behavior toward multiple female employees, yet failed to take remedial action.

Second, that Jeld-Wen, Inc., is vicariously liable for Fetner's harassment and not entitled to avail itself of the Faragher/Ellerth affirmative defense because

> (a) Jeld-Wen, Inc., did not exercise reasonable care to prevent and promptly correct Fetner's behavior; and

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[2] For purposes of summary judgment only, Jeld-Wen, Inc., conceded in the district court (and concedes on appeal) that Fetner unlawfully harassed Minix and the Simses. Thus, in resolving Jeld-Wen, Inc.'s summary-judgment motion, the district court focused exclusively on the issue of liability. Likewise, Jeld-Wen, Inc.'s liability is the only issue before us in this appeal.

(b) Minix and the Simses reasonably complied with the reporting provisions of the company's anti-harassment policy.

Linda Sims separately argues that, with respect to her claim, Jeld-Wen, Inc., cannot avail itself of the Faragher/Ellerth affirmative defense because the harassment she suffered resulted in a tangible employment action.

We will address each argument in turn.

I. STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment, applying the same standard that bound the district court and viewing the evidence and all reasonable inferences in the light most favorable to the non-moving parties. See Drago v. Jenne, 453 F.3d 1301, 1305 (11th Cir. 2006). "Summary judgment is appropriate when 'there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law.'" Id. (quoting Fed.R.Civ.P. 56(c)).

II. DIRECT LIABILITY

A. Actual Notice

Minix and the Simses first argue that Jeld-Wen, Inc., actually knew about Fetner's harassment, yet failed to take steps to remedy it. If that is true,

then Jeld-Wen, Inc., is directly liable for the harassment on the basis of its own negligence. See Ellerth, 524 U.S. at 759, 118 S.Ct. at 2267 ("[A]n employer can be liable [for a supervisor's sexual harassment] where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it."); see also Dees v. Johnson Controls World Servs., Inc., 168 F.3d 417, 421 (11th Cir. 1999). To support their argument, Minix and the Simses say that their co-worker, Kathy Thornton, who worked under Fetner and who was also sexually harassed by him, reported Fetner's harassment to fellow employee Joe Mendoza as early as September 2003. Because Mendoza was told of Fetner's harassment, Minix and the Simses reason that Jeld-Wen, Inc., itself had actual notice of it and should be held liable for not preventing Fetner's further harassment.

At all relevant times, Jeld-Wen, Inc., maintained a written anti-harassment policy.[3]

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[3] Jeld-Wen, Inc.'s anti-harassment policy stated as follows:

JELD-WEN strives to provide a productive and comfortable working environment free from harassment or discrimination including that which may be construed to offensive sexual conduct. This policy applies to every aspect of the employment relationship throughout the organization and to the dealings of employees with one another, as well as with vendors and customers.

Harassment in any form will no be tolerated by the company. Any employee who violates this policy is subject to discipline up to and including discharge. In addition, any client, customer or vendor of the company who engages in such conduct will be informed of our policy and

will be dealt with accordingly, with the aim of completely eliminating the harassment.

Harassment includes, but is not limited to, the following behaviors, if such behaviors create an intimidating, hostile or offensive environment:

- Verbal Harassment: Derogatory comments, jokes, slurs or abusive language
- Physical Harassment: Unwanted physical contact or assault.
- Visual Harassment: Leering, making sexual gestures, displaying derogatory or sexually suggestive objects, pictures, posters, cartoons, drawings, or clothing printed with derogatory material.
- Sexual Harassment: Unwelcome sexual advances, request for sexual favors, offering employment benefits in exchange for sexual favors, or any other verbal or physical conduct of a sexual nature that is directed toward an individual because of that person's gender.

Employees will be made aware of this policy and are encouraged to not tolerate harassment. Any employee who believes that he/she is being subject to objectionable conduct should promptly notify either their immediate supervisor, their General or Corporate Manager, Vice President or Subsidiary President, or the Legal Department at (541) 882-3451. Any Supervisor, General or Corporate Manager, Vice President or Subsidiary President, who has questions concerning harassment complaints shall contact the Legal Department. Additionally employees are encouraged to report any conduct they may witness against someone else, whether verbal, visual, physical, sexual, or otherwise, that they believe constitutes harassment. They should follow the same steps of contacting their immediate Supervisor, their General or Corporate Manager, Vice President, Subsidiary President, or Legal Department.

Every complaint of harassment will be investigated promptly, thoroughly, fairly, and objectively. A written investigative report will be completed for each complaint. The investigator will take detailed statements from the person making the complaint, the alleged harasser, the harassee, and the witnesses. The complaint will be kept as confidential as possible: information will be disseminated on a "need-to-know" basis only. Basic results of the investigation will be reported to the individual registering the complaint.

If the information collected during the investigation establishes that harassment or other objectionable conduct did occur, disciplinary action will be promptly taken against the harasser, up to and including

That policy required that complaints of sexual harassment be reported to the harassed employee's "immediate Supervisor" or to the harassed employee's "General or Corporate Manager, Vice President or Subsidiary President" or to a member of the Jeld-Wen, Inc., "Legal Department." Mendoza, however, was a Group Manager-i.e., a foreman-of a six-employee department that did not include Thornton. Thus Mendoza was not Thornton's supervisor-immediate or otherwise. Nor was Mendoza a "General or Corporate Manager, Vice President or Subsidiary President," or a member of the "Legal Department." Accordingly, Mendoza was not one of the persons specifically designated by Jeld-Wen, Inc.'s anti-harassment policy to receive harassment complaints. This fact is dispositive of Minix and the Simses' "actual notice" argument.

We held in Coates v. Sundor Brands, Inc. that when an employer promulgates an adequate and reasonable anti-harassment policy the employer "itself answer[s] the question of when it [is] deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures." 164 F.3d 1361, 1364 (11th Cir. 1999). And we said in Madray v. Publix Supermarkets, Inc. that once an anti-harassment policy has been effectively disseminated to an employer's employees "it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address

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termination if appropriate. Employees will not be discriminated or retaliated against for reporting harassment or participating in an investigation.

the problems and grievances." 208 F.3d 1290, 1298-99 (11th Cir. 2000) (citation omitted). We concluded in Madray that the employer did not have actual notice of sexual harassment because the aggrieved employee brought her complaints "to individuals not designated by [the employer] to receive or process sexual harassment complaints." Id. (emphasis added). In this case, when Thornton complained about Fetner to Mendoza – who, again, was not her immediate supervisor and did not hold a management position mentioned in the anti-harassment policy – she, like the employee in Madray, complained to an individual "not designated [by Jeld-Wen, Inc.] to receive or process sexual harassment complaints."[4] Id. Accordingly, we conclude that Thornton's complaint to Mendoza did not put Jeld-Wen, Inc., actually on notice of Fetner's sexual harassment, and the company cannot be held directly liable on that ground. See id. at 1294 n.3

B. Constructive Notice

Minix and the Simses next argue that Jeld-Wen, Inc., should be charged with constructive notice of Fetner's harassing behavior because "Fetner was harassing six female employees simultaneously."

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[4] We reject as without merit the argument made by Minix and the Simses that Jeld-Wen, Inc.'s anti-harassment policy is ambiguous with respect to identifying those officials authorized to receive harassment complaints; specifically their argument that a jury could reasonably conclude that Mendoza's status as a manager-albeit a Group Manager- meant that he too was designated by the policy to receive harassment complaints. Under the policy's plain terms the only managers designated to receive complaints are General Managers and Corporate Managers. Mendoza was neither.

Appellants' Br. at 17. As a general rule, constructive notice of sexual harassment, when combined with a failure to act, is sufficient to impose direct liability on an employer based on the employer's own negligence "when the harassment was so severe and pervasive that management reasonably should have known of it." Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259 (11th Cir. 2003). But in this case Minix and the Simses cannot rely on constructive notice as a basis for holding Jeld-Wen, Inc., directly liable for Fetner's harassment. That is because, as noted above and as discussed below in the context of the Faragher/Ellerth affirmative defense, Jeld-Wen, Inc., had in place at the time of Fetner's harassment an effectively disseminated written anti-harassment policy. The presence of that written policy forecloses resort to constructive notice as a means of establishing the notice required for direct liability. See Dees, 168 F.3d at 422 (stating that "in regard to the direct liability standard... the employer's notice of the harassment is of paramount importance" and that actual or constructive notice "is required for direct liability").

We held in Farley v. American Cast Iron Pipe Co. that "once a company has developed and promulgated an effective and comprehensive anti-sexual harassment policy, aggressively and thoroughly disseminated the information and procedures contained in the policy to its staff, and demonstrated a commitment to adhering to this policy, it has fulfilled its obligation to make reasonably diligent efforts to 'know what is going on' within the company." 115 F.3d 1548, 1554 (11th Cir.

1997). In Farley we concluded as a matter of law that "an employer is insulated from liability under Title VII for a hostile environment sexual harassment claim premised on constructive knowledge if the harassment when the employer has adopted an anti-discrimination policy that is comprehensive, well-known to employees, vigorously enforced, and provides alternative means of redress." Id. (emphasis added).

Minix and the Simses argue that the Farley rule does not apply in this case. For support, they cite on our decision in Watson v. Blue Circle, Inc., a hostile-environment sexual harassment case in which we determined that the district court erred when it relied on the Farley rule as a basis for granting summary judgment to the employer. 324 F.3d 1252, 1259 (11th Cir. 2003). The district court erred, we held, because there was a disputed issue of fact about whether "[the employer] ha[d] an effective sexual harassment policy." Id. (emphasis added). Our decision in Watson turned on the questionable effectiveness of the employer's anti-harassment policy and is, for that reason, distinguishable from this case. See also Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1279-80 (11th Cir. 2002) (refusing to apply the Farley rule where the anti-harassment policy at issue was not "either comprehensive or effective").

Our holdings in Watson and Miller were compelled by Farley's recognition that "[w]here there is no policy, or where there is an ineffective or incomplete policy, the employer remains liable for

conduct that is so severe and pervasive as to confer constructive knowledge." Farley, 115 F.3d at 1554 (emphasis added). Here, in contrast to Watson and Miller, Jeld-Wen, Inc., had in place an anti-harassment policy that was both comprehensive and vigorously enforced. It was neither incomplete nor ineffective.[5] Consequently, the Farley rule applies and Minix and the Simses cannot establish liability against Jeld-Wen, Inc., on the basis of the company's constructive notice of Fetner's harassment.

III. VICARIOUS LIABILITY

Directly liability to the side, Minix and the Simses argue that Jeld-Wen, Inc., is vicariously liable for Fetner's harassment. Generally, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate... authority over the employee." Ellerth, 524 U.S. at 765, 118 S. Ct. at 2270. If the harassing supervisor takes a tangible employment action against the victimized employee, the employer will be vicariously liable to the employee without the benefit of a legal defense.[6] See id.at 762-63, 118 S. Ct. at

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[5] For the reasons stated by the district court in its summary-judgment order, we reject the argument advanced by Minix and the Simses that Jeld-Wen, Inc.'s anti-harassment policy was rendered ineffective by the fact that two company officials reached different conclusions about whether particular conduct would suffice to constitute sexual harassment under the policy.

[6] Linda Sims argues below that Fetner subjected her to a tangible employment action, thus making Jeld-Wen, Inc., automatically vicariously liable to her and rendering the Faragher/Ellerth defense inapplicable. For the reasons stated below, we reject this argument.

2269; see also Dees, 168 F.3d at 422; see also Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1311(11th Cir. 2001) ("[W]hen a supervisor engages in harassment which results in an adverse 'tangible employment action' against the employee, the employer is automatically held vicariously liable for the harassment.").

But "[w]hen no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages." Ellerth, 524 U.S. at 765, 118 S. Ct. at 2270. The Faragher/Ellerth vicarious-liability defense "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexual harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." Id. The employer has the burden of proving each element by a preponderance of the evidence. Id.

A. Reasonable Care to Prevent and Correct Harassment

To establish the first element of the Faragher/Ellerth affirmative defense, Jeld-Wen, Inc., must show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Ellerth, 524 U.S. at 765, 118 S. Ct. at 2270. Although "an employer's showing that it has a sexual harassment policy does not automatically satisfy" the first element of the Faragher/Ellerth defense, Frederick, 246 F.3d at 1314, the presence of

such a policy is nevertheless a highly relevant factor, and we have consistently held that where an employer promulgates a comprehensive anti-harassment policy – one that is effectively communicated to employees and that contains reasonable complaint procedures – the employer has satisfied its burden on the prevention prong of the first element.[7] See Baldwin v. Blue Cross/Blue Shield, 480 F.3d 1287, 1303 (11th Cir. 2007); Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1287, (11th Cir. 2003); Madray, 208 F.3d at 1298-99.

At all relevant times, Jeld-Wen, Inc., maintained a comprehensive anti-harassment policy that was effectively communicated to its employees, including Minix and the Simses. In addition to having received a copy of the policy when they were hired, Jeld-Wen, Inc.'s employees received extensive training about the policy in the summer of 2003 in the wake of Minix's complaint of sexual harassment against fellow employee Ronald Bowen.[8] That

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[7] "The first element of the Faragher/Ellerth affirmative defense requires that an employer demonstrate that it took reasonable care both to prevent and correct harassment." Frederick, 246 F.3d at 1314. Neither Minix nor the Simses argue that Jeld-Wen, Inc., failed to promptly remedy Fetner's harassment. We conclude, as discussed below, that Jeld-Wen, Inc., has satisfied the remedial prong of the first element of the Faragher/Ellerth defense.

[8] Upon investigation into Minix's complaint against Bowen, Bowen promptly resigned from Jeld-Wen, Inc. Following Minix's complaint about Bowen, which Minix first made on June 27, 2003, Bowen continued to work at the plant for about three weeks while the investigation was being conducted, until his abrupt resignation on July 23, 2003. Despite the fact that Minix's problem with Bowen was resolved almost immediately, Minix maintains that she was dissatisfied with the company's response. In our view, however, Jeld-Wen, Inc.'s swift

training was conducted by Rob Sturm, Senior Corporate Counsel in Jeld-Wen, Inc.'s in-house legal department. Minix and the Simses attended the training session and were well aware of the policy's terms and its reporting provisions. There is no dispute about the fact that the policy was effectively distributed to the company's employees or that Minix and the Simses understood its requirements.

The policy is very explicit about the manner in which perceived harassment is to be reported. The policy expressly identifies five categories of workers (and one entire corporate department) to whom sexual harassment complaints must be brought. In relevant part, the policy states: "Any employee who believes that he/she is being subject to objectionable conduct should promptly notify either their immediate supervisor, their General or Corporate Manager, Vice President or Subsidiary President, or the Legal Department." The policy lists the telephone number of the Legal Department.

Minix and the Simses say the Jed-Wen, Inc.'s anti-harassment policy was not effective (and therefore cannot be relied upon to establish the prevention prong of the first element of the Faragher/Ellerth defense) because it was incapable of being vigorously enforced. They insist that the policy's major shortcoming – its vagueness and indefiniteness – is evidenced by the fact that two corporate officials held different views about whether

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response demonstrates that the company vigorously enforced its anti-harassment policy. Minix's complaint against Bowen forms no part of this case.

certain conduct would violate the policy. They also insist that Jeld-Wen, Inc., does not take sexual harassment seriously, and this, they say, is evidenced by the fact that Fetner, upon his resignation, received roughly $8,000 in severance pay to which he was not entitled under company rules. We are not persuaded that either of these facts undermines the effectiveness of the anti-harassment policy.

Any argument that the policy was rendered ineffective due to reasonable disagreements about the scope of its coverage, or that the company did not take harassment seriously, is fatally undermined by the thorough and comprehensive investigations undertaken by Jeld-Wen, Inc., to determine the veracity of the allegations against both Bowen (in 2003) and Fetner (in 2004). The investigations that were conducted – the effectiveness of which cannot be doubted, given that both resulted in the near-immediate resignations of the alleged harassers – clearly demonstrate that Jeld-Wen, Inc., vigorously and systematically enforced its anti-harassment policy in an effort to honor its pledge, stated in the policy itself, that "[h]arassment in any form will not be tolerated by the company."

We conclude that Jeld-Wen, Inc., has established that first element of the Faragher/Ellerth defense – that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Ellerth, 524 U.S. at 765, 118 S. Ct. at 2270.

B. Compliance with the Anti-Harassment Policy

To establish the second element of the Faragher/Ellerth defense, Jeld-Wen, Inc., must show that Minix and the Simses unreasonably failed to take advantage of the anti-harassment policy's complaint procedures or otherwise failed to avoid harm. See Frederick, 246 F.3d at 1315. According to the EEOC charges filed by the plaintiffs, the Simses were last harassed by Fetner on August 1, 2004, and Minix was last harassed by Fetner on July 1, 2004. Yet they did not report Fetner's harassment to any company officials specifically designated by the anti-harassment policy until months later on October 13, 2004.[9] That is the date on which the plaintiffs met with Dan Hees, a Coordinating General Manager at Jeld-Wen, Inc. Hees was one of the policy-designated officials authorized to receive sexual harassment complaints.

The Court in Ellerth stated that, although it is not strictly necessary, an employee's "unreasonable failure to use any complaint procedure provided by the employer...will normally suffice to satisfy the employer's burden under the second element of the defense." 524 U.S. at 765, 118 S. Ct. at 2270 (emphasis added). With that principle in mind, we have held that an employee unreasonably fails to take advantage of her employer's complaint procedures if she does "not us[e] the procedures in place to promptly report any harassment." Baldwin,

[9] Before that date, they did not report Fetner's harassment to anyone – a policy-designated official or otherwise – at Jeld-Wen, Inc.

480 F.3d at 1306 (emphasis added). We explained that, absent an extreme situation, a failure to promptly report that harassment "is sufficient to establish the second element of the Faraher/Ellerth defense." Id. at 1306, 1307.

In Baldwin, we emphasized that the harassed employee was under a "prompt reporting duty" – a duty expressly imposed by her employer's anti-harassment policy and by "the prophylactic rules the Supreme Court built into Title VII in the Faragher and Ellerth decisions." Id. We held that the employee "waited too late to complain" about the harassment she had been subjected to because "[h]er complaint came three months and two weeks after the first proposition incident and three months and one week after the second one." Id. at 1307. The employee in Baldwin failed to comply with her reporting duty, we noted, because her complaints were "anything but prompt, early, or soon." Id.

The same is true here. Title VII and the explicit terms of Jeld-Wen, Inc.'s anti-harassment policy placed Minix and the Simses under a "prompt reporting duty" just like the reporting duty we discussed in Baldwin. In fact, using identical language, Jeld-Wen, Inc.'s policy says that an aggrieved employee "should promptly notify" an appropriate company official about any "objectionable conduct" she experiences. (Emphasis added.) Minix did not promptly notify any appropriate company official about Fetner's harassment. Her complaint to Dan Hees, made on October 13, 2004, came roughly three years after she

claims to have been first harassed by Fetner. Nor did the Simses promptly notify any appropriate company official about Fetner's harassment. Their complaint to Hees, also made on October 13, 2004, came six months and two weeks after Linda Sims claims to have been first harassed by Fetner and four months and two weeks after Brenda Sims claims to have been first harassed by him. Like the employee in Baldwin, Minix and the Simses "wait[ed] too late to complain" and therefore unreasonably failed to comply with the reporting requirement set forth in Jeld-Wen, Inc.'s anti-harassment policy. [10] W conclude that Jeld-Wen, Inc., has successfully established the second element of the Faragher/Ellerth defense.

IV. TANGIBLE EMPLOYMENT ACTION

Finally, Linda Sims argues that Jeld-Wen, Inc., cannot avail itself of the Faragher/Ellerth defense because she was subjected to a tangible employment action. See supra at 11-12. In opposition to Jeld-Wen, Inc.'s motion for summary judgment, Sims argued that when she rebuffed Fetner's sexual advances, Fetner ordered another

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[10] Minix, for her part, explains that her decision to wait so long to complain about Fetner's harassment was reasonable based on her dissatisfaction with the way Jeld-Wen, Inc., handled her complaint against Bowen in 2003. Jeld-Wen, Inc., however, launched an immediate investigation into Minix's complaint against Bowen, and he abruptly resigned mere weeks after her complaint was made. Because Jeld-Wen, Inc.'s response to the Bowen complaint was beyond reproach, we reject Minix's reasonable-delay argument as wholly without merit. The Simses offer no reason for their delay.

employee to send Sims home from work, thus reducing the number of hours she could work and the amount of money she could earn.[11] This, she said, constituted a tangible employment action because it affected the terms and conditions of her employment. The district court recognized that Sim's allegation amounted to a tangible employment action, but rejected this as a basis for recovering against Jeld-Wen, Inc. The court held that Sims could not show a causal connection between Fetner's harassment and the fact that she was sent home early from work – events that the district court determined occurred nearly two months apart from each other.

We too reject Sims's Title VII claim to the extent that it is premised on the occurrence of a tangible employment action. We do so because Sims did not allege facts in her EEOC charge from which it could be reasonably inferred that Fetner took a tangible employment action against her. [12] Instead, the facts alleged in Sims's EEOC charge demonstrate that she was alleging discrimination against Jeld-Wen, Inc., solely under a hostile-environment theory.

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[11] Jeld-Wen, Inc., says that Sims failed to make this argument in the district court and that we should, for that reason, reject it on appeal. Although the argument was made in the district court (albeit not forcefully), for the reasons discussed below, we reject it because Sims did not allege a tangible employment action in either her EEOC charge or in her complaint; she made the allegation for the first time in opposition to summary judgment – which, even if Title VII did not contain an exhaustion requirement, would be too late. See Gilmour v. Gates, McDonald and Co., 382 F.3d 1312, 1313 (11th Cir. 2004).

[12] Nor did Sims make such an allegation in her judicial complaint. Rather, Sims made this allegation for the first time in her brief in opposition to summary judgment.

These are the only facts alleged in Sims's EEOC charge:

> I began my employment during April of 2004 as a Router. Almost from the beginning of my employment I have been subjected to sexual harassment from the plant manager consisting of sexual comments regarding my body parts, requests to go out on dates, touching my body around the waist, placing his arms around me and pulling me close to his body. He often referred to my buttocks as basketballs and he would say he wanted to go dribbling. I rejected the harassment but it continues. I believe I am being discriminated against because of my sex, female, in violation of Title VII of the Civil Rights Act of 1964, as amended.

As is clear from her EEOC charge, Sims did not allege that her refusal to submit to Fetner's sexual demands culminated in a tangible employment action – e.g. a reduction in hours[13] - the very allegation she is now pursuing judicially.

"The starting point of ascertaining the permissible scope of a judicial complaint alleging employment discrimination is the administrative charge and investigation." Alexander v. Fulton County, Ga., 207 F.3d 1303, 1332 (11th Cir. 2000). "No action alleging a violation of Title VII may be brought unless the alleged discrimination has been made the subject of a timely-filed EEOC charge." Id.

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[13] See Cotton v. Cracker Barrel Old Country Store, Inc., 434 F.3d 1227, 1231 (11th Cir. 2006).

clearly focus" any of the hostile-environment allegations made in her EEOC charge. Rather, Sims's tangible-employment-action allegation is an "allegation [] of [a] new act[] of discrimination" that we have said is "inappropriate" where, as here, it has not been alleged in a previous EEOC charge. See Gregory, 355 F.3d at 1279-80; see also Cheek v. Western and Southern Life Ins. Co. 31 F.3d 497, 503 (7th Cir. 1994) ("When an EEOC charge alleges a particular theory of discrimination, allegations of a different type of discrimination in a subsequent complaint are not reasonably related to them unless the allegations in the complaint can be reasonably inferred from the facts alleged in the charge.").

To the extent that Sims attempted to rest her Title VII claim in the district court on a tangible employment action by Fetner, the claim was not properly before the court because allegations of such a claim were never made the subject of an EEOC charge of discrimination – a prerequisite to suit.[14]

V. CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

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[14] We may affirm the judgment of the district court for any reason supported by the record. See United States v. $121,100.00 in the U.S. Currency, 999 F.2d 1503, 1507 (11th Cir. 1993).

AFFIRMED.

A True Copy-Attested
Clerk U.S. Court of Appeals
Eleventh Circuit

BY:_____
Deputy Clerk
Atlanta, Georgia

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, EASTERN DIVISION

LORENA MINIX, BRENDA SIMS, and LINDA SIMS,	)	
PLAINTIFFS,	)	
v.	)	**CIVIL ACTION NO.**
	)	**3:05cv685-MHT**
	)	**(WO)**
JELD-WEN, INC.,	)	
DEFENDANT.	)	

OPINION

Plaintiffs Lorena Minix, Brenda Sims, and Linda Sims bring this lawsuit under Title VII of the Civil Rights Act of 1965, as amended, 42 U.S.C. §§ 1981a, 2000e through 2000e-17, against their former employer, defendant JELD-WEN, Inc., claiming that they were sexually harassed by their supervisor, Richard Fetner.[1] Jurisdiction is proper under 42 U.S.C. § 2000e-5(f).

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[1] Minix and the Simses' state-law claims, along with defendant Fetner, have bee

This lawsuit is before the court on JELD-WEN's motion for summary judgment. As explained below, the motion will be granted.

I. SUMMARY-JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Under Rule 56, the party seeking summary judgment must first inform the court of the basis for the motion. The burden then shifts to the non-moving party to demonstrate why summary judgment would not be proper. Celotex Corp. v. Catrett, 477 U. S. 317, 323 (1986); see also Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115-17 (11th Cir. 1993) (discussing burden-shifting under Rule 56). The non-moving party must affirmatively set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials in the pleadings. Fed. R. Civ. P. 56(e).

The court's role at the summary-judgment stage is not to weigh the evidence or to determine the truth of the matter, but rather to determine only whether a genuine issue exists for trial. Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 249 (1986). In doing so, the court must view the evidence in the

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n dismissed (Doc. No. 36).

light most favorable to the non-moving party and draw all reasonable inferences in favor of that party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U. S. 574, 587 (1986).

II. BACKGROUND

Sometime between late 2001 and early 2002, JELD-WEN took over a facility, located in Roanoke, Alabama, that manufactured wooden components used in the construction of doorframes.

At various times, Lorena Minix worked for JELD-WEN from the time it took over the Roanoke facility until November 2004; she had also worked for JELD-WEN's predecessor. Brenda Sims and Linda Sims (no relation to Brenda) also worked at the facility from June 2004 through November 2004.

Richard Fetner, the immediate supervisor of Minix and the Simses, sexually harassed them during their employment in 2004. Fetner touched their legs and breasts without their consent, and directed inappropriate comments, including the following, to each of them:[2]

> (1) He offered to "fix" Minix's timecard if she would have sex with him;[3] told her that he'd "like to eat her from the top of [her] head to [her] toes"; and repeatedly asked her to have sex with him.[4]

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[2] Plf. Brief in Opp. Summ. J. (Doc. No. 37), 2-5.
[3] Id., Exhibit 1, Minix dep. (hereinafter Minix dep.), 284:2-14.
[4] Id., 279:2-3.

(2) He repeatedly propositioned Brenda Sims,[5] saying that, if she came home with him, she would not have to worry about missing work time. On one occasion, Brenda Sims was sent home from work, although there was work to do on her job, and, as a result, lost hours and wages.[6]

(3) He told Linda Sims that her "butt looked like two basketballs" and he "wanted to go dribbling."[7] On another occasion, he came up behind her and said that one of her "basketballs" looked "deflated" and he "had a needle that could pump [her] up."[8] He also mimicked dribbling a basketball when walking past her.[9] Linda Sims was also sent home when there was still work on her job.[10]

Fetner sexually harassed three other women at the facility. Fetner touched and grabbed Kathy Thornton and stuck broom handles up her skirt while she was working;[11] he also grabbed his crotch in front of her. Thornton reported Fetner's conduct to a coordinating group manager at the plant, but the group manager and JELD-WEN never pursued the

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[5] Id., Exhibit 2, Brenda Sims dep. (hereafter B. Sims dep.), 150:2-5.
[6] Id., 162:10.
[7] Id., Exhibit 3, Linda Sims dep. (hereafter L. Sims dep.) 134-135:2, 11, 22, 31.
[8] Id., 136:18-20.
[9] Id., 135:10-13.
[10] Id., 153:14-154:2.
[11] Id., Exhibit 4, Thornton dep. (hereinafter Thornton dep.), 87:16-21.

complaint.[12] Fetner also sexually harassed Linda Cook while she was employed at the Roanoke facility. He touched her between her legs in her "private" area;[13] his attempts to touch her were an "everyday thing."[14] Fetner forced a third woman to have sex with him.

Minix was also harassed at the JELD-WEN facility by a coworker named Ronald Bowen, who masturbated in front of her.[15] She and another plant worker complained to a manager. A week later, counsel for JELD-WEN visited the facility,[16] and anti-harassment training was given at the facility, including training on the company's sexual harassment policy. Bowen quit his job.[17]

On October 13, 2004, Minix and the Simses reported Fetner's harassment to JELD-WEN. That morning, after the company began an investigation into his behavior, Fetner resigned. He was awarded severance. JELD-WEN closed the Roanoke facility shortly thereafter, in late 2004.

In November and December of 2004, Minix and the Simses separately filed charges of sexual harassment with the Equal Employment Opportunity Commission (EEOC), and eventually received right-to-sue letters. The Simses' EEOC

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[12] Id., 105:15-17.
[13] Id., Exhibit 5, Cook dep. 91:10-15.
[14] Id., 208:17-23.
[15] Minix dep., 219:5-11.
[16] Id., 222:22-224:13.
[17] Id., 229:10-12.

charges indicated that the harassment stopped in August 2004. Minix's charge indicated that the harassment stopped in July 2004.[18]

Minix and the Simses brought this lawsuit in July 2005.

III. DISCUSSION

Title VII makes it "an unlawful employment practice for an employer... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex." 42 U.S.C. § 2000e-2(a) (1). Sexual harassment violates Title VII's prohibition of discrimination based on sex. Meritor Sav. Bank, FSB v. Vinson, 477 U. S. 57 (1986).

The only issue before the court is JELD-WEN's liability for Fetner's actions; JELD-WEN does not, at this point, dispute that unlawful harassment took place. Thus, the discussion that follows is confined to the issue of JELD-WEN's liability.

Where, as here, a supervisor has harassed an employee, the company is liable for the harassment where the plaintiff can prove that a tangible employment action was taken against her in connection with the harassment. In the absence of a tangible employment action, the company is still liable unless it can prove that (1) it exercised

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[18] Def. M. Summ. J. (Doc. No. 30), Exhibits 22, 31, 43, EEOC charges.

reasonable care to prevent and correct the harassment and (2) the plaintiff failed to pursue reasonably corrective opportunities. Faragher v. City of Boca Raton, 524 U. S. 775 (1998); Johnson v. Booker T. Washington Broad. Service, 234 F.3d 501, 508 (11th Cir. 2000).

Minix and the Simses contend that a tangible employment action was taken against each of them, and that the company is liable even in the absence of such an action because it did not exercise reasonable care to prevent or correct the harassment they suffered.

A. Tangible Employment Action

"A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc. v. Ellerth, 524 U. S. 742, 761 (1998). Where there has been a tangible employment action, no defenses are available to the company. Id. at 765. Minix and the Simses argue that they have suffered a tangible employment action.

To establish JELD-WEN's liability for sexual harassment based on a tangible employment action, Minix and the Simses must demonstrate that "[their] reaction to the unwelcome behavior affected tangible aspects of [their] compensations, or terms, conditions or privileges of employment." Brown v. Snow, 440 F.3d 1259 (11th Cir. 2006) (internal quotations and

citations omitted). Thus, the issue here is whether Minix's and the Simses' reactions to the sexual harassment (not responding to Fetner's propositions) led Fetner to take a tangible employment action against them.

As this case is framed, there are two elements of a claim based on tangible employment action: first, whether the employment action was, in fact, tangible; and, second, whether there was, in fact, a connection between the harassment, including here the refusal, and the employment action. Cotton v. Cracker Barrel Old Country Store, 434 F.3d 1227, 1231 (11th Cir. 2006).

The Simses contend that two sorts of tangible actions were taken against them: lost hours and reassignment. Minix challenges only her reassignment.

1. The Simses' Lost Hours

The Simses maintain that they were sent home and lost hours (and, therefore, wages) as a result of rebuffing Fetner's advances. According to them, Fetner did not send them home himself, but rather instructed another employee to do so.

Employment decisions that alter compensation are obviously tangible employment decisions, and thus "a reduction in an employee's hours, which reduces the employee's take home pay, qualifies as a tangible employment decision." Cotton, 434 F.3d at 1231. Thus, the Simses' loss of hours satisfies the

first requirement of the tangible employment action standard.

The Simses have not, however, adequately established a fact issue as to the necessary "casual link between the tangible employment action and the sexual harassment." Id. While "[t]emporal proximity between the harassment and a tangible employment action can give rise to a genuine issue of fact as to causation," id. at 1232, Linda Sims's loss of hours happened two months after she acknowledged that the harassment stopped; this period of time, without more (that is, standing alone), is too long for a factfinder to be able to conclude, other than by mere speculation, that there was a causal relationship between the harassment and the loss of hours.[19] Brenda Sims does not remember when the harassment occurred,[20] and thus, other through mere speculation, cannot create a fact issue with respect to it.

2. Minix's and the Simses' Reassignments

Minix's and the Simses' reassignments to different, and less personally desirable, workstations do not survive scrutiny either. While an undesirable reassignment can be a tangible employment action, Ellerth, 524 U. S. at 765, the reassignments here cannot be considered such.

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[19] L. Sims dep., 151:20. The date of the end of the harassment is set by the date in the plaintiff's EEOC charge.

[20] B. Sims dep., 162:1 2.

In Davis v. Town of Lake Park Florida, 245 F.3d 1232 (11th Cir. 2001), after using standards for tangible employment action to inform those for adverse employment action, the Eleventh Circuit Court of Appeals held that the plaintiff's removal as "Officer in Charge," or OIC, of a police station was not an adverse employment action. First, as the court explained, the reassignment did not bring with it any increase in salary or benefits, or unique opportunities for advancement. Also, the OIC position was a temporary assignment in addition to his duties as an officer; it was "solely... a stop-gap measure to ensure that certain duties are fulfilled in the event the officer normally responsible for those duties becomes unavailable" and was done as "a matter of course." 245 F.3d at 1244. Therefore, removal from the position was not a diminution in prestige or a demotion. Id.

Similarly, in Puckett v. Potter, 342 F. Supp.2d 1056 (M. D. Ala. 2004) (Thompson, J.), this court held that a one-hour change in an employee's hours was not an adverse employment action because the plaintiff lost no pay, and "[did] not allege that the one-hour change in her shift was accompanied by any loss of prestige, responsibility, or opportunity for advancement"; indeed, as the court said, the plaintiff was "doing the very same job as before." 342 F. Supp.2d at 1067. In addition, because the plaintiff "had her hours changed not infrequently, ... a reasonable person would view [the] decision to change [her] hours as just a regular part of working for the [defendant] and not as an adverse tangible employment action." Id.

The situation for Minix and the Simses is analogous to the situations in Davis and Puckett. Minix's and the Simses' reassignments did not bring with them any increase or decrease in salary or benefits or in unique opportunities for advancement; employees were temporarily and frequently reassigned to make sure that the work got done. Minix and the Simses introduced no evidence that there was anything adverse, tangible or intangible, incident to their reassignments. Therefore, a reasonable person would view their reassignments as "just a regular part of working for [JELD-WEN] and not as an adverse tangible employment action." Puckett, 342 F.Supp.2d at 1067.

Moreover, to the degree that Minix and the Simses allege, as they must, that their reassignments were causally related to Fetner's sexual harassment by virtue of proximity in time, again this allegation must fail. Reassignments were so frequent and routine, and were so much an expected part of their job, that it would be purely speculative, on the current record, to assume that there was any causal relationship between their reassignments and Fetner's harassment.[21] See Cotton, 434 F.3d at 1233 ("When an employer contemplates a given action before the harassment takes place, temporal proximity between the action and the incident of harassment alone will not suffice to show causation.").

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[21] Minix dep., 72:13-73:7, 86:22-87:25; L. Sims dep. 99:1-102:2; B. Sims dep., 50:1-8.

Thus, neither Minix nor either of the Simses has raised an issue of fact that would preclude summary judgment in favor of JELD-WEN on whether they were subjected to a tangible employment action.

B. Non-Tangible Employment Injury

In the absence of a tangible employment action, a company may still be held liable for a supervisor's harassment. Johnson v. Booker T. Washington Broad. Service, 234 F.3d 501, 508 (11th Cir. 2000). However, where there is no tangible employment action, the company has a defense available to it. That defense was established by the Supreme Court in Ellerth and Faragher.

Balancing the policies expressed in Title VII--avoidance of harm and compensation to victims--the Court in Faragher and Ellerth established a defense that put part of the responsibility for avoiding harm on the employer and part of the responsibility on the individual suffering the harassment. Faragher, 524 U. S. at 806. Thus, the defense relates both to the actions of the company and the actions of the complainant, even though the company bears the burden of proving it. First, the employer must prove that it exercised reasonable care to prevent the harassment, or to correct it, for example, by creating and implementing a sexual harassment policy. Second, the employer must prove that plaintiff failed to pursue reasonable corrective opportunities. Id.

Minix and the Simses argue that JELD-WEN failed to exercise reasonable care in two ways. First, they argue that JELD-WEN is liable, even if it did not have any notice of Fetner's harassment, because the administration of its sexual harassment policy was inadequate. Second, they argue that the company had notice of the harassment and failed to correct it promptly.

1. The Employer's Duty

If JELD-WEN failed to exercise reasonable care to prevent and correct the harassment, it cannot establish the affirmative defense; if, on the other hand, it did exercise reasonable care, it must still prove that Minix and the Simses failed to take advantage of corrective opportunities.

a. Reasonable Care to Prevent the Harassment

An employer will generally satisfy the first prong of the test where it administers a sexual harassment policy that is, "comprehensive, well-known to employees, vigorously enforced, and provides alternate avenues of redress." Farley v. American Cast Iron Pipe Co., 115 F.3d 1548 (11th Cir. 1997). The policy cannot be administered "in bad faith" or be "otherwise defective or dysfunctional." Madray v. Publix Supermarkets, 208 F.3d 1290, 1299 (11th Cir. 2000).

While the "wide variety of employment settings" makes it challenging to determine whether

a harassment policy will fulfill this requirement, id., Faragher suggests that the policy must be well-distributed and provide avenues for reporting the harassment to individuals other than the harasser. 542 U. S. at 808.

The policy here was well distributed, in that Minix and the Simses each acknowledge having received a copy, and the company conducted training on the policy, including after the incident in which Minix alleged that Bowen harassed her. The policy also provides adequate avenues for reporting other than to the harassing supervisor; the harassment is appropriately reported to the employee's supervisor, group manager, corporate manager, the vice president or subsidiary president or the legal department.[22]

However, Minix and the Simses argue that the policy was inadequately administered, and, in support of their contention, point to a disagreement between Dan Hees, a manager with ultimate responsibility for the Roanoke facility, and one of JELD-WEN's lawyers, over whether certain behaviors would violate JELD-WEN's policy.[23] Minix and the Simses argue that this dispute is proof that the policy was not comprehensive and known to the employees.

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[22] Def. M. Summ. J. (Doc. No. 30), Def. Exhibit. A, sexual harassment policy.

[23] Id., Exhibit K, Hees dep., 79:14-25, 80:1-4; id., Exhibit M, Strum dep. 118:20-25, 119:1-11.

This dispute is not enough to raise an issue of fact on the administration of the policy. Although, as a logical matter, a policy must be reasonably comprehensible in order to be known to employees, there is no requirement that the policy be so clear that it can never be open to disagreement on interpretation. Indeed, common sense dictates that such a requirement would be impossible to meet. Even federal courts frequently disagree on matters of interpretation of Title VII. There is no evidence that, despite his interpretive disagreement with one of the company's lawyers, Hees was unaware of the policy or that he did not vigorously administer it in good faith.

On the other hand, there is ample evidence that the policy was administered in good faith. For example, in the wake of the incident where Bowen allegedly harassed Minix, and before Fetner's harassment of Minix and the Simses, a training session was conducted at the plant.[24]

Minix and the Simses also argue that the decision to award Fetner severance pay is evidence of bad faith in the administration of the policy. While it is understandable that Minix and the Simses are outraged that the company paid severance to an individual who offended them so deeply, their argument that this is evidence a lack of reasonable care in preventing and correcting harassment is without merit. As a result of Fetner's resignation, of which his severance pay was incident, he would be prevented from harassing Minix and the Simses at

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[24] Minix dep., 227:19.

work in the future. Far from showing a lack of seriousness about the policy, Fetner's severance in the face of investigation shows that the policy worked.

b. Reasonable Care to Correct the Harassment

However, having a comprehensive, adequate sexual harassment policy that is adequately administered in good faith does not insulate the employer from liability if it had notice of the harassment and failed to correct it. "[T]he employer's notice of the harassment is of paramount importance because if the employer had notice of the harassment then it is liable unless it took prompt corrective action." Madray, 208 F.3.d at 1300.

Here, Minix and the Simses assert that JELD-WEN had actual knowledge of the harassment because another employee, Kathy Thornton, had reported similar harassment by Fetner to a Group Manager, Joe Mendoza.[25] Mendoza occupied the same level in the plant hierarchy that Fetner, Minix and the Simses' supervisor and harasser, did, albeit in another part of the plant.

Where a company employs a sexual harassment policy that lays out the steps an employee should take to report sexual harassment, it "itself answers the question of when it [is] deemed to have notice of the harassment sufficient to

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[25] Thornton dep., 208:17-23.

obligate it or its agents to take prompt and appropriate remedial measures." Madray, 208 F.3d at 1300; Coates v. Sundor Brands, 164 F.3d 1361, 1364 (11th Cir. 1999). The question, when there is such a policy, is whether the employee made "reasonably sufficient use of the channels created by [the company's] policy to put [the company] on notice of the ongoing harassment." Id. (emphasis added).

JELD-WEN argues that Thornton's complaint to Mendoza about the harassment was not a reasonably sufficient use of its policy, such that the company could was on notice of the harassment. The policy, of which both the plaintiff and non-plaintiff complainants were aware, advises employees to contact "their supervisor, their General or Corporate Manager, Vice President or Subsidiary President, or the Legal Department."[26] Mendoza was not Thornton's supervisor, nor was he the supervisor of any of the plaintiffs in this action.

Thornton's mere conversation with Mendoza was not sufficient to have put JELD-WEN on notice. "[I]nformal complaints to individuals not designated by [the company's policy] to receive or process sexual harassment complaints" do not normally put a company on notice. Madray, 208 F.3d at 1300. Although Mendoza was a manager, he was not a person designated by JELD-WEN's policy to receive complaints by those supervised by others. The reporting hierarchy set forth in JELD-WEN's policy

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[26] Def. M. Summ. J. (Doc. No. 30), Def. Exhibit. A.

clearly indicates that the appropriate individual to receive complaints is a supervising superior—that is, an individual with direct authority over the complainant in the plant hierarchy. The policy directs complainants to report complaints to "their" mangers. Mendoza was not, in any sense, Thornton's manager.

While "an employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law," Madray, 208 F.3d at 1302, JELD-WEN did not impose unreasonable reporting requirements upon Thornton by requiring that she report to a supervising superior—someone with responsibility for her. Rather, this requirement seems aimed at making sure that employees' complaints are dealt with responsibly and appropriately; a supervising superior, by contrast to someone without authority over a complainant, in theory has responsibility for the complainant and her work environment. It is logical that such a person would be more likely to have both the authority and the responsibility to deal appropriately with the complaint. Indeed, the company may be trying to avoid precisely what happened here: Thornton complained to someone outside her reporting hierarchy, who had no responsibility for her area or her personally and who, as a result, did nothing about it.

This is not to say that a complainant may not put the company on notice by complaining to someone outside her hierarchy within a company; it

is only to say that the structure of JELD-WEN's policy was reasonable and that, under the law, that structure informs that court's view of whether it had notice.

Finally, Minix and the Simses do not dispute that JELD-WEN acted promptly to correct Fetner's harassment once they reported his harassment to the proper person. JELD-WEN therefore exercised reasonable care in preventing and correcting harassment.

2. The Employee's Duty

The second factor of the defense is the employee's failure to take advantage of corrective opportunities. "If the plaintiff unreasonably failed to avail herself of the employer's preventative or remedial apparatus, she should not recover damages that could have been avoided if she had done so." Faragher, 524 U. S. at 807. It is undisputed that, for the time period before the plant's closure, Minix and the Simses failed to avail themselves of this policy, and that, when they did, Fetner resigned.

Minix and the Simses argue that this failure was reasonable, given that Minix had reported sexual harassment before, in the instance of Bowen's harassment, and was "dissatisfied" with the outcome of JELD-WEN's procedure. However, the procedure in Bowen's case seems to have been fully adequate. A week after Minix complained, a JELD-WEN lawyer came to investigate and do a sexual

harassment training,[27] and, that day, Bowen quit his job.[28] Minix complains that she was forced to work with Bowen for some portion of that week; however, Minix's working alongside Bowen for less than a all three plaintiffs here to report the harassment reasonable.

In other words, Minix and the Simses cannot recover against JELD-WEN because it failed to act when the reason the company failed to act was that Minix and the Simses failed to give notice. Put another way, because Minix and the Simses failed to inform JELD-WEN a reasonable period of time before the facility closed that they were being harassed, the company could not have acted earlier (that is, months or weeks before it closed) to remedy the harassment. The evidence reflects that, in each instance when the company was informed of harassment pursuant to its policy, the offending employee left and thus there was a swift and effective end to the harassment.

> Thus, JELD-WEN has proven that Minix and the Simses unreasonably failed to take advantage of the policy.

* * * *

In conclusion, the record reflects that, while there was impermissible sexual harassment of Minix and the Simses, JELD-WEN cannot be held accountable. An appropriate judgment will be entered.

DONE, this the 17th day of October, 2006.

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[27] Id.
[28] Id.

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/s/ Myron H. Thompson

UNITED STATES DISTRICT JUDGE

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No. 07-717

Supreme Court, U.S.
FILED
DEC 28 2007
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In The

Supreme Court of the United States

Lorena Minix, et al.,

Petitioners,

v.

JELD-WEN, inc

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeal
for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented a compelling reason for this Court to grant review of the Eleventh Circuit's decision when there is no conflict between the decision and either a decision of this Court or of a federal court of appeals, and no departure from the law of harassment and an employer's affirmative defense as it has developed from this Court's seminal decisions in Burlington Indus. v. Ellerth, 524 U.S. 742, 760-65 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Sup. Ct. R. 29.6, JELD-WEN, inc. is privately held and no publicly held corporation owns 10% or more of its stock. Furthermore, none of JELD-WEN, inc.'s subsidiaries, conglomerates, affiliates or parent corporations are publicly traded.

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INTRODUCTION

Petitioners assert two intertwined bases upon which they contend this Court should grant certiorari review based on how the Eleventh Circuit and the district court interpreted the notice requirement of the Farragher/Ellerth affirmative defense in a supervisor sexual harassment action devoid of any tangible employment action. First, Petitioners contend that the Eleventh Circuit's decision conflicts with the decisions of other Courts of Appeal. However, a comparison of the other circuits' decisions with Eleventh Circuit precedent reveals that there is no such conflict. Second, Petitioners generally argue that the Eleventh Circuit has foreclosed constructive notice as a means for an employer to have notice of alleged harassment. Again, a review of Eleventh Circuit precedent reveals that the cases do not support Petitioners' contention. Accordingly, the writ is due to be denied.

STATEMENT OF THE CASE[1]

The three Plaintiff-Petitioners ("Plaintiffs") are former employees of Respondent JELD-WEN, inc.'s ("JELD-WEN") Roanoke, Alabama facility who were employed there until the facility closed in late 2004. Each Plaintiff first reported allegations of sexual harassment by their immediate supervisor, Group Manager Richard Fetner, in a meeting with Dan Hees, a JELD-WEN Coordinating General Manager, on the morning of October 13, 2004. Before noon on that same day, Hees met with the alleged harasser and his JELD-WEN employment ended during the meeting.

JELD-WEN has a policy that prohibits harassment, providing in relevant part:

> JELD-WEN strives to provide a productive and comfortable working environment free from harassment or discrimination including that which may be construed to be offensive sexual

[1] As this case was disposed per a Fed. R. Civ. P. 56 Motion for Summary Judgment, the facts are stated herein in the manner most favorable to the Petitioner/Plaintiffs as required by Fed. R. Civ. P. 56. Respondent does not concede any fact and it is noted that several primary witnesses generally denied the Plaintiffs' allegations during discovery. Furthermore, in rebuttal to Plaintiffs' factual representations per S. Ct. R. 15(2), Plaintiff Minix did not report Bowers's conduct; she only requested to be moved without explaining the basis for the request. She also did not work with Bowers for two weeks after the report as she was on vacation and on holiday [i.e., July 4th] during most of that time.

conduct. This policy applies to every aspect of the employment relationship throughout the organization and to the dealings of employees with one another, as well as with vendors and customers.

Harassment in any form will not be tolerated by the company. Any employee who violates this policy is subject to discipline up to and including discharge.

* * *

Employees will be made aware of this policy and are encouraged to not tolerate harassment. Any employee who believes that he/she is being subject to objectionable conduct should promptly notify either their immediate Supervisor, their General or Corporate Manager, Vice President or Subsidiary President, or the Legal Department at (541) 882-3451. Any Supervisor, General or Corporate Manager, Vice President or Subsidiary President, who has questions concerning harassment complaints shall contact the Legal Department.

* * *

Every complaint of harassment will be investigated promptly, thoroughly, fairly and objectively.

* * *

> If the information collected during the investigation establishes that harassment or other objectionable conduct did occur, disciplinary action will be promptly taken against the harasser, up to and including termination if appropriate. Employees will not be discriminated or retaliated against for reporting harassment or participating in an investigation.

(emphasis added). There is no claim in this matter that JELD-WEN's policy is defective in any fashion. Although it is unclear why Plaintiffs waited such a long period of time to actually report the alleged conduct, it is undisputed that they were aware of JELD-WEN's policy and the procedures to report the alleged conduct. In fact, outside persons (EEOC representatives, attorneys and others) advised each plaintiff that the conduct should be reported per the provisions of JELD-WEN's policy long before the October 13th report and at least one Plaintiff testified that she knew that she was supposed to report the conduct to Mr. Hess.

Because JELD-WEN's policy is effective and because JELD-WEN acted promptly and effectively to correct the alleged conduct when the conduct was reported, the two lower courts determined that JELD-WEN had established the affirmative defense to vicarious liability recognized by this Court in *Faragher* and *Ellerth*. Plaintiffs are unable to directly attack the determination of the two lower courts so Plaintiffs attempt to circumvent their failure to report through an allegation that a fellow employee, Cathy Thornton, had previously discussed

alleged harassment by Fetner with Joe Mendoza, a "group manager" at the facility.

The "group manager" position is akin to a foreman (first line supervisor) in JELD-WEN's hierarchy; Mendoza was neither Thornton's nor any of the Plaintiffs' immediate supervisor and it is undisputed that Mendoza only supervised six (6) employees, all general laborers, at the facility and he "coordinated" the work of two "groups" (column turning and finger joint) that included the six employees. The alleged harasser, Fetner, was also a group manager although he supervised more than thirty general laborers. The group manager positions reported to the Acting General Manager who, in turn, reported to the Coordinating General Manager who, in turn, reported to the Vice President who, in turn, reported to the President of this particular JELD-WEN group. Although Mendoza denies that any inappropriate conduct was ever reported to him[2],

Plantiffs' argument is essentially that a report to *any* JELD-WEN supervisor is sufficient to give JELD-WEN notice of the alleged conduct. Plaintiffs' argument is not supported by this Court's precedent or by the cases cited in Plaintiffs' brief seeking certiorari review:

> An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

Faragher, 524 U.S. at 807.

JELD-WEN's policy was the "effective mechanism" referenced in Faragher and afforded its employees no fewer than five avenues to report alleged harassment. Plaintiffs' efforts in this case are nothing more than an effort to expand an already effective policy to fit the facts of their case; neither they nor Thornton reported the conduct in the manner designated by the policy which would have provided an opportunity to correct the behavior. Their efforts contradict the purpose of Title VII as interpreted by this Court: "Although Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." Faragher, 805-806 (internal quotes and citations omitted).

Plaintiffs also argue that, even in cases where the alleged harassment was overt and permeated a work location, the Eleventh Circuit has adopted a standard that restricts JELD-WEN and other employers from having notice of alleged harassment except in cases where notice is given under the terms of the policy. Plaintiffs' misstatement of Eleventh Circuit precedent will be addressed in the following section. However, notwithstanding the misstatement, Plaintiffs' own testimony negates the ability to credibly rely on a constructive notice theory of recovery. Fetner surreptitiously directed the alleged objectionable conduct towards the three Plaintiffs and other female employees in a manner that other management personnel would not be able to observe the conduct. For example, the most egregious alleged conduct was directed towards Ms. Thornton and was all directed towards her in her own work area, a large

room where she worked alone or with one other person who could not see her work station from his. The undisputed facts do not establish that the facility was permeated with overt harassment.

REASONS FOR DENYING THE PETITION

I. THERE IS NO COMPELLING REASON TO GRANT CERTIORARI REVIEW UNDER RULE 10 BECAUSE THERE IS NO CIRCUIT CONFLICT.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Plaintiffs attempt to establish that there is a conflict between the Eleventh Circuit's decision in this case, based on Eleventh Circuit precedent, and the decisions of other United States courts of appeal. No circuit conflict exists. Plaintiffs cite five cases to support their argument that a conflict is present. None of the cited cases matches the facts of this case because each of the five cases involved direct notice to upper-level company management and senior-level human resources representatives, not alleged notice to a front-line supervisor who was not the reporting employee's immediate supervisor.

Petitioners' challenge to the Eleventh Circuit's decision amounts to nothing more than a claim that they should somehow be excused from complying with the employer's ". . .proven, effective mechanism for reporting and resolving complaints of sexual harassment." Faragher, 524 U.S. 775, 806-807. Under the rules of this Court and clear precedent construing those rules, Petitioners' asserted grounds for review fail to meet the high threshold for granting

a petition. The circumstances under which review may be granted have by necessity been narrowly drawn given the manifest impossibility of reviewing every case in which the lower court is alleged to have been wrong.

As noted, in the five cases cited by Plaintiffs, the court generally determined that the employer had notice because a senior-level management employee had notice of the conduct. The employer's harassment policy was mentioned in some but not all of the cases. In Erickson v. Wisconsin Dept. of Corrections, 469 F.3d. 600 (7th Cir. 2006), the Seventh Circuit held that the employer had prior notice of potential danger to the plaintiff-employee (who was raped on the job) because the employee previously informed *five* senior managers, including the employee's direct supervisor and human resources director, of prior threatening conduct by the offending person. In Howard v. Winter, 446 F.3d 559, 569 (4th Cir. 2006), the court held that the employee's report of alleged sexual harassment to a senior human resources representative was sufficient to put the employer on notice even though the employer's policy required that the report be made up the "chain of command". A key component of the Fourth Circuit's analysis was that the employee was a "senior member of the Human Resources Department" and not just "any NAVAIR employee." Id. In Randolph v. Ohio Dept. of Youth Serv., 453 F.3d 724, 735 (6th Cir. 2006), the harassed employee and co-workers made numerous complaints to their immediate supervisor and to a senior level supervisor who reported directly to the Superintendent. Based on the reports to senior level personnel, the Court held that the employee's failure to follow the employer's sexual harassment policy did

not bar their claim. In Curran v. AMI Fireplace Co. Inc., 163 Fed. Appx. 714, 716 (10th Cir. 2006), an employee's complaints to the employer's office manager and the general manager who supervised the office manager were sufficient to put the employer on notice. The policy at issue in the Curran case apparently only identified the Human Resources Manager and not the senior-level manager notified by the employee. Id. at 720. In Jackson v. Quanex Corp., 191 F.3d 647, 662 (6th Cir. 1999), the complaining employee reported some, but not all, of the complained of racial harassment to management and/or his immediate supervisor and the employer never responded to any of the conduct even though management had direct knowledge of slurs, graffiti and internal tolerance of discrimination through its own observation and failure to act. Id.

Similar to the cases upon which Plaintiffs rely in an effort to establish a circuit conflict but contrary to Plaintiffs' contention, the Eleventh Circuit has proven willing to permit claims to proceed even though the employee did not strictly comply with the reporting mechanism set forth in the employer's policy. Each case involved circumstances where there was some deficiency in the employer's efforts to prohibit and/or correct illegal harassment, conditions that are not present in the case for which writ is sought. In Dees v. Johnson, the employer acted promptly upon notice to end the harassment, just as JELD-WEN did in this case. However, the Eleventh Circuit reversed summary judgment for the employer based on earlier notices of the conduct by another employee to human resources and by a second other employee to members of upper management. 168 F.3d 417, 419-423 (11th Cir. 1999). Likewise, in Olson

v. Lowe's Home Centers, Inc., 130 Fed. Appx. 380, 390 (11th Cir. 2005), the Eleventh Circuit held that notice of harassment per the company's "open door" policy was sufficient to provide notice to the company of alleged harassment even though the notice provided under the terms of the open door policy did not strictly conform to the requirements of the company's harassment policy. Furthermore, the Sixth Circuit's Jackson decision is analogous to the Eleventh Circuit's decision in Miller v. Kenworth of Dothan, Inc., 277 F. 3d 1269, 1275 (11th Cir. 2002), wherein the Eleventh Circuit affirmed a jury's verdict that the employer was on notice because the service manager was present when ethnic slurs were directed at the plaintiff.

Plaintiffs' specific request is that the Eleventh Circuit should be required to apply a "totality of the circumstances" test in evaluating whether notice is effective. Petition for Writ of Certiorari, p. 10. In fact, the Eleventh Circuit does apply such a standard in appropriate cases. See Allen v. Tyson Foods, Inc., 121 F.3d 642, 647 (11th Cir. 1997) (reversing summary judgment for employee because lower court failed to evaluate the "totality of the circumstances" in assessing whether conduct was persuasive enough to put the employer on notice as required by Faragher). Thus, it is clear that the Eleventh Circuit does not impose an inflexible standard on reporting incidents of harassment and considers the totality of the circumstances in assessing whether the employer has knowledge. Rather the Eleventh Circuit's interpretation and application of the affirmative defense is consistent with this Court's decisions in Faragher and Ellerth wherein this Court recognized a need to balance the imposition of strict vicarious

liability on an employer for its supervisor's harassing conduct with the goal of encouraging the employer to maintain an environment free of prohibited harassment:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 524 U.S. 742, 765, Faragher, 524 U.S. 775, 807-808

The Eleventh Circuit case law that has developed in this area and that is questioned by Plaintiffs in this case is consistent with this mandate. As a threshold query in the Faragher/Ellerth affirmative defense analysis, the employer must have an *effective* policy that includes, among other elements, sufficient reporting avenues:

> once an employer has promulgated an effective anti-harassment policy and disseminated that policy and associated procedures to its employees, then it is incumbent upon the employees to utilize the procedural mechanisms established by the company specifically to address problems and grievances.

Madray v. Publix Supermarkets, Inc., 208 F.3d 1290, 1300 (11th Cir. 2000); Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1364 (11th Cir. 1999) (noting requirement of an adequate and reasonable sexual harassment policy). In following this Court's decision and requiring an effective policy as a threshold to the defense, the Eleventh Circuit has addressed the concerns expressed by the Plaintiffs in this matter and, at the same time, balanced the respective interests of the employer and employee: the employee has a right to be free of harassment but the employer has an opportunity to correct deviations from its effort to maintain a harassment-free environment. However, in cases such as this one where the alleged harassment is outside the presence of management, it is only through the employees' reports that the employer will have the opportunity to remedy workplace harassment. There is no circuit conflict on this issue and there is no compelling reason to grant the writ.

II. THE ELEVENTH CIRCUIT RECOGNIZES CONSTRUCTIVE NOTICE IN APPROPRIATE CASES REGARDLESS OF THE MERE EXISTENCE OF A POLICY.

Plaintiffs' second argument is closely related to the first. They argue that the Eleventh Circuit's standard completely eliminates any avenue for the employer to be held to have constructive notice of prohibited harassment where the employer has a policy prohibiting harassment. Plaintiffs argue that "[t]he Eleventh Circuit's approach would allow an employer to avoid responsibility, when it has notice, based on its own policy, drafted as much to avoid liability than to prevent harm to its employees." Petition for Writ of Certiorari, p. 21. Plaintiffs' argument fails to consider that, contrary to their argument, Eleventh Circuit precedent does not foreclose notice simply because the employer has a "policy" under appropriate facts. Rather, as noted above, the threshold inquiry is whether the employer has an *effective* policy. The employer will be held to have notice if the "policy" is not an effective policy, either in its design or its enforcement. See Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259-1261 (11th Cir. 2003) (reversing summary judgment for employer because employer's policy was ineffective thus constructive knowledge could attach).

Likewise, other circumstances can also warrant exceptions in the Eleventh Circuit. For example, where the conduct considering all relevant circumstances is sufficiently prevalent that the employer's upper management is on notice of the conduct, the Eleventh Circuit has held that the

employer has notice of the conduct notwithstanding that the employer has a policy in place and that the employee failed to properly report the conduct. Miller v. Kenworth of Dothan, Inc., 277 F. 3d 1269, 1275 (11th Cir. 2002) (employer liable where service manager observed conduct and overhead ethnic slurs directed at the plaintiff and did nothing to correct behavior). However, such circumstances were not present in this case as no other manager witnessed Fetner's conduct and it is clear that the Eleventh Circuit's threshold requirement of an effective policy is consistent with this Court's standards as set forth in Faragher and Ellerth. To the extent plaintiffs argue that there should be some pure constructive notice of alleged harassment, this Court addressed that contention in Faragher and Ellerth by requiring that the policy and the employer's enforcement and corrective measures be adequate to prevent and properly correct alleged harassment. Again, there is no compelling reason to issue the writ.

III. THE ELEVENTH CIRCUIT PROPERLY APPLIED THE LAW IN THIS ACTION

JELD-WEN's policy prohibiting harassment satisfies the standards announced in this Court's decision in Ellerth: the employee is permitted to report alleged harassment to his or her supervisor and up the reporting line through JELD-WEN's hierarchy. See Ellerth, 524 U.S. 742, 760-765. Notwithstanding that each plaintiff and Ms. Thornton all were aware of the proper reporting structure, they failed to report the alleged conduct per the terms of the policy. Accordingly, they were afforded ample opportunity to avoid harm, yet failed to take advantage of the opportunity. When the conduct was

finally reported, JELD-WEN acted swiftly to correct the behavior and insolate its work site from illegal harassment. The Eleventh Circuit's analysis is consistent with Faragher and Ellerth.

CONCLUSION

There is no compelling reason to grant Petitioners' writ in this matter. As demonstrated herein, there is no circuit conflict and the Eleventh Circuit' interpretation and application of the law in this area are consistent with this Court's precedent. Accordingly, the writ is due to be denied.

Respectfully submitted,

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No. 07-717

In The

Supreme Court of the United States

Lorena Minix, et al.,

Petitioners,

v.

JELD-WEN, inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Sup. Ct. R. 29.6, JELD-WEN, inc. is privately held and no publicly held corporation owns 10% or more of its stock. Furthermore, none of JELD-WEN, inc.'s subsidiaries, conglomerates, affiliates or parent corporations are publicly traded.

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No authorities are cited herein.

SUPPLEMENTAL BRIEF

Pursuant to S. Ct. R. 15(8), Respondent submits this Supplemental Brief to address an intervening assertion by Petitioners that was not available at the time Respondent submitted its Brief in Opposition. Respondent's Supplemental Brief is submitted solely to rebut an erroneous factual assertion first made in Petitioners' Reply to Respondent's Brief in Opposition ("Reply Brief"). Such rebuttal is consistent with S. Ct. R. 15(2) which requires that Respondent rebut any incorrect factual assertion set forth in Petitioners' representations to the Court.

Specifically, Petitioners assert at page 2 of their Reply Brief that:

> On the contrary, Petitioners argue that a report of harassment to one of only two management employees at the facility, when the other management employee is the perpetrator...is sufficient evidence for a jury to conclude that the notice requirement has been met under this Honorable Court's holding in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), and its progeny.

Petitioners' assertion is directly contrary to the undisputed record evidence in this matter, which established that, in addition to Mr. Fetner and Mr. Mendoza (i.e., the two employees referenced in the above excerpt), Pat Galvez was also onsite at the Roanoke facility as its Acting General (Plant) Manager. Both Mr. Mendoza and Mr. Fetner reported directly to Mr. Galvez. Mr. Mendoza only worked at

the Roanoke facility from October 2002 until October 2003 and Mr. Galvez was the Acting General (Plant) Manager during that entire time. Mr. Galvez was both available and effective as evidenced by his participation in the investigation of another employee's harassment allegation that resulted in the accused employee's separation.

Further, although Mr. Galvez's immediate supervisor, Coordinating General Manager Dan Hees, was based in Sparta, Tennessee, Mr. Hees visited the Roanoke facility once or twice per month, with each visit lasting about three days. In fact, the Roanoke facility was one of only three plants for which he had responsibility. Petitioners' express representations are contrary to the uncontroverted record evidence and should not be considered by this Court in determining whether *certiorari* review is warranted.

CONCLUSION

Respondent restates that there is no justification for *certiorari* review in this matter and Petitioners' writ is due to be denied.

Respectfully submitted,

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No. 07-717

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

LORENA MINIX, BRENDA SIMS, and LINDA SIMS,

PETITIONERS,

v.

JELD-WEN, INC.,

RESPONDENT.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Reply to Respondent's Brief in Opposition

Respondent's brief in opposition begins by attempting to minimize the authority of Joe Mendoza, the coordinating group manager at the facility in question, who received a report of severe sexual harassment by the perpetrator in this case, Richard Fetner, against a female employee, Kathy Thornton, which preceded the harassment of Petitioners. Mendoza, a management employee of Respondent for fifteen years, took no action after being placed on notice of Fetner's harassment. Mendoza admitted that he was required to take action when given a report of sexual harassment. (See Petition pp. 7-8).

Respondent devotes a half page footnote to argue that the Petitioners have "misconstrued" Mendoza's responsibilities, after receiving a report of harassment. However, courts are required to view the evidence in its light most favorable to the Petitioners. The Petitioners used the sworn testimony of Mendoza, himself, to establish his duties, which he failed to fulfill, after receiving the report of harassment from Ms. Thornton.

Moreover, a jury should be permitted to view the evidence under the totality of circumstances to determine if Respondent was negligent in permitting the harassment of Petitioners to occur, rather than exclusively analyzing the case under the Respondent's anti-harassment policy, which is only relevant, under the Faragher/Ellerth defense, for a

determination of vicarious liability, not direct liability based on the employer's negligence.

Respondent contends that Petitioners argue that a report of harassment to any supervisor should establish notice of the alleged conduct. (See Respondent's brief, p. 5). On the contrary, Petitioners argue that a report of harassment to one of only two management employees at the facility, when the other management employee is the perpetrator, coupled with the testimony of said management employee that he is trained to act on complaints, and failed to do so, is sufficient evidence for a jury to conclude that the notice requirement has been met under this Honorable Court's holding in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), and its progeny. Mendoza's supervisory position is similar to the ones held by the persons in the cases cited by Petitioners from other circuits which embrace the legal theory embodied by Meritor and advanced by Petitioners.

Respondent's attempt to dispute the clear conflict between the circuits in determining whether an employer has notice of unlawful harassment is wholly unpersuasive. Notwithstanding Respondent's contention to the contrary, the Eleventh Circuit could not have been clearer that an anti-harassment policy, alone, determines whether notice has been proven by a harassed employee. The Eleventh Circuit held, "when an employer promulgates an adequate and reasonable anti-harassment policy, the employer 'itself answers the question of when it is deemed to

have notice.'" (See Appendix, p. 8a, quoting Coates v. Sundor Brands, Inc, 164 F.3d 1361, 1364 (11th Cir. 1999). Unfortunately, the Eighth Circuit followed the reasoning in this case, regarding this very issue of law in Weger v. City of Ladue, __F.3d__, 2007 WL 2669425 8th Cir. 2007).

This line of reasoning ignores the fact that this Court's decisions in Faragher and Ellerth extended employer liability to include vicarious liability, under certain circumstances; it did not intend to limit establishing employer liability, based on its failure to act after being placed on notice that harassment exists. See Burlington Industries, Inc, v. Ellerth 524 U.S. 742, 759 (1998). To allow the employer to escape liability, based on its own negligence, by defining the terms upon which it can be held responsible, transforms the Faragher/Ellerth affirmative defense from a shield against vicarious liability to a sword to arbitrarily defeat direct liability.

Respondent's attempt to distinguish this case, with the cases cited in the petition, from the Fourth, Sixth, Seventh, and Tenth Circuits is also unpersuasive. Although no two cases are factually identical, Respondent concedes, as it must, that these circuits, unlike the Eleventh and Eighth circuits, properly hold that direct liability can be established, even if the harassed employee does not follow an anti-harassment policy, if the totality of circumstances demonstrate negligence by the

employer in failing to remedy harassment, after being placed on notice of same.

The cases cited in the petition from the Sixth, Seventh, and Tenth Circuits all found that notice was demonstrated, to establish direct liability by the employer, when a supervisor, at the place of employment where the harassment occurred, was told or knew of the harassment and failed to take remedial action. (See Erickson v. Wisconsin Department of Corrections, 469 F.3d 600 (7th Cir. 2006), Curran v. AMI Fireplace Company, Inc., 163 Fed. Appx. 714 (10th Cir. 2006), Randolph v. Ohio Department of Youth Services, 453 F.3d 724 (6th Cir. 2006).

That is precisely what occurred in this case. It is both logical and just to allow a harassed employee to satisfy the notice requirement when they demonstrate a report of harassment to management employees, on site, who have been trained, like Joe Mendoza, to act on the report.

The similarities to the case sub judice and the ones cited in the petition are the reason Respondent attempts to minimize the authority and responsibility of Mendoza. It seeks to confine employer liability, based on the employer's own negligence, to terms which the employer, alone, can define. This concept is anathema to negligence, which uses the reasonable person objective standard to determine if liability exists, not the subjective pronouncements of one of the parties.

The only way to resolve this conflict between the circuits is for this Honorable Court to grant the petition and reaffirm its holdings in Meritor, Faragher, and Ellerth that an employer can be held liable for supervisor sexual harassment, should a plaintiff demonstrate that the employer was negligent is failing to remedy harassment it had notice of, notwithstanding the existence of, or the adherence to, an anti-harassment policy.

Lastly, the Respondent's contention that the Eleventh Circuit's ruling leaves room for constructive notice to be used as a mechanism to establish employer liability, when an anti-harassment policy exists, is also without merit. Respondent is correct that Eleventh Circuit law allows constructive notice to be used when an anti-harassment policy is deemed ineffective. (See Watson v. Blue Circle, Inc., 324 F.3d 1252,1259-1261 (11th Cir. 2003). However, this analysis misses the point.

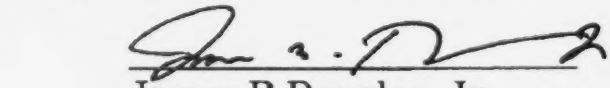
This Honorable Court, as stated before, used the Faragher and Ellerth decisions to expand employer liability in Title VII sexual harassment cases. Under the Meritor decision, which was specifically upheld as to constructive notice by Faragher and Ellerth, an employer is liable for sexual harassment it should have known about and failed to correct. If an employer can escape that liability, simply by having an anti-harassment policy, effective or not, then liability, based on constructive notice, has effectively been abrogated by the mere existence of the policy.

In short, an employer should be held liable when it has constructive notice of the harassment and fails to remedy it. Although the facts of this case clearly establish constructive notice, due to the pervasive and wide-spread nature of the harassment, the Eleventh Circuit failed to even analyze the question because it never moved beyond the anti-harassment policy, which is not an affirmative defense to employer liability based on the fact that an employer has constructive notice of unlawful harassment and fails to take action. Again, the only way to remedy this degradation of constructive notice employer liability is for this Honorable Court to grant the petition and reaffirm its long-standing holdings regarding it.

CONCLUSION

Based on the forgoing, petitioners respectfully request that this Honorable Court grant the writ of certiorari and reverse the Judgment of the Eleventh Circuit.

Respectfully submitted this 10th day of January, 2008.



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